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No. 09-500

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

YANET DISHMEY ROSARIO De GEORGE,

Petitioner,

v.

DAWIND GEORGE and MARIA DIAZ,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Should this Court review the factual determinations of the District Court and the Circuit Court that under New York's Estate Powers and Trust Law, petitioner Yanet Dishmey, decedent's "wife" from a bigamous marriage, was not entitled to recover wrongful death damages?

II. Should this Court review the factual determinations of the District Court and the Circuit Court when petitioner Yanet Dishmey has presented no evidence in support of her claim that the marriage she challenges was entered into solely to defraud federal immigration officials?

III. Should federal courts disregard the long-standing federalism principle leaving domestic relations and intestacy determinations to state law and invalidate a marriage allegedly entered into solely for the purpose of defrauding immigration officials, even though the record contains no evidence to support the fraud allegation?

PARTIES TO THE PROCEEDINGS

American Airlines, Inc., an original defendant, was not a party to the proceeding in the Court of Appeals.

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
INTRODUCTION	1
STATEMENT OF THE CASE	3
PROCEEDINGS BELOW	5
REASONS FOR DENYING THE PETITION	9
I. The District Court and the Second Circuit Correctly Applied and Interpreted New York's Wrongful Death Distribution Law.	9
II. Petitioner Has Presented No Evidence That the Marriage She Seeks to Invalidate Was Intended to Defraud Federal Immigration Officials.	11

Contents

	Page
III. This Case Presents No Federal Issue. ..	13
A. Under New York Domestic Relations Law, Petitioner Was Never Validly Married to Decedent.	13
B. Federal Immigration Laws Are Not Relevant to this Dispute.	15
CONCLUSION	17

TABLE OF CITED AUTHORITIES

Page

Federal

Boyd v. Heckler,
588 F.Supp. 31 (E.D.N.Y. 1984) 14

Chin Bick Wah v. United States,
245 F.2d 274 (9th Cir. 1957) 16

Grabois v. Jones,
89 F.3d 97 (2d Cir. 1996) 9, 13

In re Air Crash at Belle Harbor, New York on November 12, 2001,
2007 WL 1575251 (S.D.N.Y. May 30, 2007) ... 8

In re Burrus,
136 U.S. 586 (1890) 13

Metropolitan Life Ins. Co. v. Jackson,
896 F.Supp. 318 (S.D.N.Y. 1995) 14

Milano v. Secretary of Health and Human Services,
586 F.Supp. 1431 (E.D.N.Y.1984) 14

State of Ohio ex rel. Popovici v. Agler,
280 U.S. 379 (1930) 13

United States v. Lutwak,
344 U.S. 604 (1953) 16

Page

United States v. Rubenstein,
151 F.2d 915 (2d Cir. 1945) 16

United States v. Yazell,
382 U.S. 341 (1966) 15

Wetmore v. Markoe,
196 U.S. 68 (1904) 15

State

In Matter of Estate of Dominguez,
2002 WL 31844696
(Sur.Ct.Bronx Cty., Nov. 18, 2002) 10

Statutes

8 U.S.C. § 1325(c) 15

18 U.S.C. § 1546(a) 15

N.Y. Domestic Relations Law §6 13

N.Y. Estate Powers & Trusts Law §5-4.1 2

N.Y. Estate Powers & Trusts Law §5-1.2(a) 10

INTRODUCTION

Petitioner Yanet Dishmey ("Petitioner") presents no compelling reason for granting her petition for a writ of *certiorari*. *See* Sup. Ct. R. 10. Petitioner does not argue that the Second Circuit's decision conflicts with a decision of this Court or another Court of Appeals. *See* Sup. Ct. R. 10(a). Nor does she demonstrate that the decision below decided an important federal question unsettled by this Court. *See* Sup. Ct. R. 10(c). Rather, Petitioner asks this Court to (1) engage in a factual review of the decisions of both courts below and (2) upset long-settled federalism principles and invade the province of state law-making by invalidating New York's domestic relations and intestacy distribution statutes on the specious ground that those state laws conflict with federal immigration laws.

In this wrongful death settlement distribution dispute, the District Court and the Circuit Court looked to the law of the state where the decedent resided, was domiciled and was married, New York, in deciding Petitioner's motion to disqualify Denise Valderrama, decedent's wife, from recovering wrongful death benefits.

Applying New York's Estate Powers & Trusts Law, the District Court found, and the Circuit Court affirmed, that no ground – as specifically set forth in the New York statute – justified disqualifying Ms. Valderrama. At the time Milton George died, he was still legally married to Denise Valderrama and, therefore, she was entitled to share in the wrongful death recovery.

Petitioner presented no evidence to support the claim that she, and not Ms. Valderrama, is a recovering spouse for distribution purposes. While she argues here that federal laws concerning immigration fraud require disqualifying the first wife from sharing in the settlement, she has never submitted any evidence that the Valderrama-George marriage was entered into solely to deceive federal immigration officials.

Even if Petitioner had presented evidence establishing that the Valderrama-George marriage was entered into for the sole purpose of obtaining United States citizenship and with the intent to defraud immigration officials, the District Court and the Second Circuit properly applied the law of the State of New York in holding that such federal criminal behavior did not affect the wrongful death settlement distribution. In reviewing the parties' relationships, the lower courts correctly applied the law of the place of the Valderrama-George marriage, New York, and in weighing the competing claims to recovery, the lower courts correctly applied the law of the place of decedent's residence and domicile, New York. Under New York law, Denise Valderrama cannot be disqualified as a recovering spouse, even if the Valderrama-George marriage was a "sham" marriage intended only to obtain legal residency for Mr. George. *See* N.Y. Est. Powers & Trusts L. § 5-4.1.

Petitioner has failed to meet her burden of demonstrating any compelling reason justifying a grant of *certiorari* and her petition should be denied.

STATEMENT OF THE CASE

Milton George died in the crash of American Airlines Flight 587 in Belle Harbor, New York on November 12, 2001. Pet. App. 175.[1] He is survived by, among others, his mother, his six children, his wife Denise Valderrama, his live-in companion Maria Diaz and his girlfriend, Petitioner Yanet Dishmey. *Id.*, 175-176.

Mr. George was born in the Dominican Republic on March 11, 1956. *Id.*, 178. He moved to New York City in 1986, where he met Denise Valderrama. *Id.*, 251, 255. Mr. George married Ms. Valderrama in New York City on August 18, 1989. *Id.*, 179, 193, 216, 251. That marriage was Mr. George's first. *Id.*, 193, 251, 254. Milton George and Denise Valderrama eventually separated, but never divorced. *Id.*, 193, 251, 252.

In 1992, Mr. George met Maria Diaz. *Id.*, 179. Mr. George and Ms. Diaz established a long-term domestic relationship. *Id.*, 179, 255. Mr. George and Ms. Diaz owned a home together, had a son together and together ran a business owned by Mr. George. *Id.*, 176, 179, 254, 274, 284. Despite their long-term domestic and professional partnership, Mr. George and Ms. Diaz never married. *Id.*, 278. During the course of their nearly decade-long relationship, Ms. Diaz was aware that Mr.

1. References to the appendix Petitioner submitted to this Court are cited herein as "App." followed by page number. References to the appendix Petitioner submitted to the Second Circuit are cited herein as "Pet. App." followed by the page number. References to the additional appendix Respondent submitted to the Second Circuit are cited as "Resp. App." followed by the page number.

George remained legally married to Ms. Valderrama. *Id.*, 278. Indeed, Mr. George never married Ms. Diaz precisely because he had never divorced his first and only legal wife, Ms. Valderrama. *Id.*, 254, 255, 278.

In April of 2001, Milton George went on vacation to the Dominican Republic. *Id.*, 255, Resp. App., 3. At the time, he was still co-habiting with Ms. Diaz and their son. Pet. App., 255. While in the Dominican Republic, Milton George telephoned his brother Mario – a licensed attorney and a confidant of Milton George – to tell Mario that he had met a young woman named Yanet Dishmey. Resp. App., 3. Milton told Mario that he wanted to have a physical relationship with Ms. Dishmey, but that she insisted that he marry her first. *Id.* Mario warned his brother that marrying Yanet would be illegal because he was still married to Denise Valderrama. *Id.* Milton George acknowledged to Mario that he knew this. *Id.* Nevertheless, Milton George married Ms. Dishmey, knowing that he was still legally wed to Denise Valderrama, and without any intention of ending his relationship with Ms. Diaz. *Id.* A few days after the marriage, Milton called Mario to tell him that he had gone ahead and married Yanet, knowing that he had done something wrong and wanting to keep it a secret from his partner, Maria Diaz. *Id.* Milton George also telephoned his eldest son, Dawind George, to tell him of the bigamous marriage, again acknowledging that the marriage to Yanet Dishmey was illegal because he was still married to Denise Valderrama. Pet. App., 255. Milton asked his son to keep the invalid marriage to Yanet Dishmey a secret. *Id.*

Upon his return from the Dominican Republic, Milton George resumed his life with Ms. Diaz and their son. *Id.*, 255, 278. Mr. George never divorced or legally separated from his wife Denise Valderrama, nor did he attempt to separate from Maria Diaz, nor did he make any effort to legitimize his relationship with Yanet Dishmey. *Id.*, 255. Rather, in November 2001, Mr. George arranged to return to the Dominican Republic, where he intended to annul his marriage to Ms. Dishmey. *Id.* Before he could do so, however, Mr. George died in the crash of American Airlines Flight 587 on November 12, 2001. *Id.*

PROCEEDINGS BELOW

In February of 2003, Dawind George, as eldest son of the decedent, petitioned the Surrogate's Court of New York County for Letters of Administration of the Estate of Milton George. Pet. App,177, 214, 254, 281. The two alleged spouses, Denise Valderrama and Yanet Dishmey, were served with notices of the proceedings in Surrogate's Court. *Id.*, 177. Maria Diaz, as guardian of decedent's minor son Kelvin George, cross-petitioned for Letters of Administration. *Id.*, 277. Neither Denise Valderrama nor Yanet Dishmey made an appearance to claim any right to Letters of Administration as spouse or to object in Surrogate's Court to Letters of Administration being granted to Dawind George and Maria Diaz. *Id.*, 177. On April 7, 2003, Letters of Temporary Administration were issued to Dawind George and Maria Diaz, naming them as Co-Administrators and authorizing them to prosecute an action for the wrongful death of Milton George. *Id.*, 197, 214, 277, 281.

The Co-Administrators, through their counsel, gave Yanet Dishmey, through her counsel, an opportunity to submit proof that Milton George intended to legitimize his marriage to her. *Id.*, 180, 221. In two letters, dated April 14, 2004 and April 28, 2004, Petitioner's attorney admitted that Petitioner's claim for wrongful death damages was based on Dominican law, which counsel believed would support recovery to a woman who had been supported by her "husband in fact," making "irrelevant" the Co-Administrators' "technical legal argument concerning marriage." *Id.*, 218-219, 223.

Dawind George and Maria Diaz filed suit in the Southern District of New York for the wrongful death of Milton George on behalf of all of his lawful wrongful death distributees and heirs. *Id.*, 176. That lawsuit was assigned to Judge Robert W. Sweet as part of Multi-District Litigation No. 1448 (MDL No. 1448). *Id.*, 41-42. Four other lawsuits for the death of Milton George were filed in other districts and transferred to Judge Sweet as part of MDL No. 1448, and were consolidated under one civil action number pursuant to an Order of the District Court dated January 12, 2004. *Id.*, 644; Resp. App., 5-9. The four other suits were (1) the action brought on behalf of Yanet Dishmey, as alleged spouse; (2) the action brought on behalf of Denise Valderrama, as surviving spouse; (3) the action brought on behalf of Ana Rollins, as surviving mother; and (4) the action brought on behalf of Smailyn George, as surviving son. Pet. App., 644; Resp. App., 5-9.

According to the January 12, 2004 Consolidation Order, when multiple actions were brought for the same decedent, "the person authorized to conduct settlement negotiations with the defendants on behalf of all claimants and the estate of such decedent shall be known as the 'Designated Representative[.]'" Resp. App., 6. Since Maria Diaz and Dawind George were appointed Co-Administrators by the Surrogate's Court of New York County, they shared the role of designated representative. Pet. App., 644.

As Co-Administrators, Dawind George and Maria Diaz, through their counsel, conducted factual investigations, obtained and reviewed official records pertaining to the decedent, interviewed family and friends of the decedent and responded to the discovery requests and interrogatories of defendants American Airlines and Airbus. *Id.*, 178. The Co-Administrators negotiated a confidential settlement offer for the wrongful death of Milton George that they agreed to accept, subject to the District Court's entry of a compromise order approving the settlement. *Id.*

On June 9, 2006, Petitioner, claiming that she, not Ms. Valderrama, was the legal spouse of decedent Milton George, moved in the District Court to disqualify Denise Valderrama as a wrongful death beneficiary. *Id.*, 152-154. Additionally, Petitioner requested that she share in any wrongful death settlement proceeds obtained by the Co-Administrators of Milton George's Estate. *Id.*, 153. All parties submitted affidavits and documentary evidence in support of their respective positions. The District Court denied Ms. Dishmey's motion, determining that, of the two women who claimed legal

right by marriage to share in the estate's wrongful death settlement, only the first wife, Ms. Valderrama, from whom Milton George was never divorced, was entitled to a portion of the recovery. *In re Air Crash at Belle Harbor, New York on November 12, 2001*, 2007 WL 1575251 (S.D.N.Y. May 30, 2007). After full briefing and oral argument, the Second Circuit affirmed the District Court's judgment in its entirety, ruling that the decedent's marriage to Petitioner was void and, "[a]ccordingly, [Petitioner] is not entitled to recover as a surviving spouse." App., 32. As to Petitioner's argument that federal immigration laws displaced state domestic relations and intestacy distribution statutes, the Second Circuit noted that Petitioner

> engages in a misguided attempt to use federal immigration law as grounds for her argument that the George-Valderrama marriage was 'void ab initio.' Although federal immigration law may treat a marriage entered into solely to obtain a 'green card' as 'void' for purposes of eligibility for favorable immigration status, federal immigration law is not applicable to domestic relations or intestacy determinations, which are governed by state law.

Id., 25.

This petition followed entry of the Second Circuit's denial of Petitioner's request for rehearing.

REASONS FOR DENYING THE PETITION

This case presents no federal question; the Circuit Court's decision does not conflict with the decision of any other federal court of appeals; and the courts below did not depart from the accepted and usual course of judicial proceedings that might justify the exercise of this Court's supervisory power. The District Court correctly applied New York's intestacy distribution law and found no ground for disqualifying Denise Valderrama from sharing in the wrongful death distribution. The Second Circuit, affirming that decision, properly determined that the validity of a marriage was to be determined pursuant to New York law. New York law is clear that "a second marriage is invalid if either of the parties to that marriage is already married." *Grabois v. Jones*, 89 F.3d 97, 100 (2d Cir. 1996) (citing N.Y. Dom. Rel. Law § 6). Petitioner has admitted that no divorce had taken place with respect to the Milton George-Denise Valderrama marriage. App. 32. Accordingly, this Court should deny her petition for a writ of *certiorari*.

I. The District Court and the Second Circuit Correctly Applied and Interpreted New York's Wrongful Death Distribution Law

The District Court denied Petitioner's motion to disqualify Denise Valderrama as a recovering spouse. Applying New York law, the District Court noted that "the grounds for disqualifying a spouse from recovering wrongful death damages are rather narrow." App. 4.

Under New York law, a spouse can be disqualified from recovering wrongful death damages in only six situations. According to section 5-1.2(a) of New York's Estate Powers and Trusts Law, a husband or wife is a surviving spouse who is entitled to recover wrongful death damages *unless* it is established satisfactorily to the court having jurisdiction over the action or proceeding that (1) the marriage was dissolved by divorce or annulment valid under New York law; (2) the marriage was incestuous; (3) the spouse seeking recovery had procured a divorce or annulment not valid under New York law; (4) a separation judgment valid under New York law was in place at the time of the death; (5) the spouse seeking recovery had abandoned the deceased spouse; or (6) the spouse seeking recovery was obligated to support the deceased spouse, but failed to do so. *N.Y. Est. Powers & Trusts L.* § 5-1.2(a).

The plain language of the statute establishes that entering a marriage for the sole purpose of supporting an immigration petition – which is Petitioner's only argument in support of her claim to disqualify Ms. Valderrama – does not disqualify a surviving spouse from participation in wrongful death proceeds. *See In Matter of Estate of Dominguez*, 2002 WL 31844696, at *5 (Sur.Ct.Bronx Cty., Nov. 18, 2002) (holding that a surviving spouse cannot be disqualified from receiving wrongful death proceeds pursuant to section 5-1.2 merely because the marriage was shown to be for the purpose of securing permanent resident status). Even if Milton George and Denise Valderrama married exclusively in order to obtain legal residency in the United States for Mr. George, that alone could not disqualify Ms. Valderrama from recovering wrongful death settlement proceeds under New York law.

II. Petitioner Has Presented No Evidence That the Marriage She Seeks to Invalidate Was Intended to Defraud Federal Immigration Officials

Petitioner relies only on her own conclusions and self-serving statements in asserting that the Valderrama-George marriage was a "sham, conducted only for immigration purposes." She cites to the following three pieces of "evidence," two of which are statements from her attorney, to support that claim:

1. A statement in the affidavit from Petitioner's counsel claiming that Maria Diaz, decedent's live-in companion, said that Milton George "married [Denise Valderrama] just to speed the Green Card process." Pet. App., 381.

2. A statement in the same affidavit from Petitioner's counsel claiming that Maria Diaz said that Milton George and Denise Valderrama never co-habited. *Id.*, 381.

3. The fact that Milton George and Maria Diaz lived together and had a child together three years after Milton George married Denise Valderrama. *Id.*, 179.

The two self-serving attorney's statements rely on hearsay contradicted in relevant part by the declarant and are not admissible proof of Petitioner's claims. The fact that in 1992 Mr. George had a child with Ms. Diaz is likewise not proof that his marriage three years earlier was entered into solely for fraudulent purposes.

Finally, Petitioner relies on her allegations that "during the month before he married Petitioner . . . Mr. George retained a divorce attorney in the Dominican Republic to obtain a divorce from Ms. Valderrama" and that "divorce papers were drawn up to dissolve Mr. George's marriage to Ms. Valderrama but his attorney neglected to finalize the matter." Even if true, these actions only serve to establish that Mr. George was still legally, validly married to Ms. Valderrama when he bigamously married Petitioner.

Contrary to Petitioner's representations, the record evidence establishes that Milton George and Denise Valderrama married in 1989 and never divorced. That evidence includes affidavits from Milton George's brother Mario George, Milton George's live-in companion Maria Diaz and Milton George's son Dawind George. Pet. App, 250-56,277-79. In addition, the parties submitted documentary evidence including the 1989 New York County certificate of the marriage between Milton George and Denise Valderrama and a certified Search Certificate from the Office of the County Clerk for the County of New York stating that no record of divorce of Milton George and Denise Valderrama existed in that office from January 1, 1989 through December 31, 2001. *Id.*, 276, 294.

Petitioner has submitted no reliable or admissible proof that the marriage was entered into for the sole purpose of defrauding federal immigration officials.

III. This Case Presents No Federal Issue

Even, however, if the record did establish that the marriage was intended to fraudulently obtain legal residency in the United States, as this Court has repeatedly recognized, "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593-94 (1890); *see also State of Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383-84 (1930) ("If when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States, there is no difficulty in construing the instrument accordingly and not much in dealing with the statutes.")

A. Under New York Domestic Relations Law, Petitioner Was Never Validly Married to Decedent

If a person, who is already legally married, attempts to enter into a subsequent marriage without dissolving the first, the subsequent marriage "is absolutely void." *N.Y. Dom. Rel. Law* § 6. Petitioner has admitted, both during oral argument to the Second Circuit and by the evidence she submitted below, that Milton George and Denise Valderrama were married in 1989 and were never legally divorced. Though under New York law, when more than one person claims to be the legal spouse of another, a rebuttable presumption of validity attaches to the most recent of marriages, *see Grabois*, 89 F.3d at 100, that presumption is irrelevant if the parties

acknowledge that the earlier marriage was never dissolved.

In this case, the meaningful record searches and sworn statements are sufficient to rebut any presumption that the second marriage was valid, were the presumption to apply. *Metropolitan Life Ins. Co. v. Jackson*, 896 F.Supp. 318, 322 (S.D.N.Y. 1995); *see also Milano v. Secretary of Health and Human Services*, 586 F.Supp. 1431, 1434 (E.D.N.Y.1984) (presumption rebutted when search of divorce records found no evidence of recorded divorce); *Boyd v. Heckler*, 588 F.Supp. 31, 33 (E.D.N.Y. 1984) (testimony from wife and child of first marriage that first marriage was not dissolved, plus record searches in two locations where divorce was most likely to have been procured, proved validity of first marriage under New York law). In this case, the evidence establishes that Milton George and Denise Valderrama were still married at the time that Milton George married Petitioner. First, the marriage certificate shows that Milton George and Denise Valderrama wed in 1989. Second, the certificate from the New York County Clerk demonstrates that no judgment of divorce with respect to that marriage was ever entered with his office. Third, the sworn affidavits from Milton George's brother, son and domestic partner all state that Milton George and Denise Valderrama never dissolved their marriage. Fourth, Petitioner submitted no proof below that the Valderrama-George marriage was ever dissolved. The evidence in the record easily overcomes whatever presumption might have attached to Petitioner's bigamous marriage.

B. Federal Immigration Laws Are Not Relevant to this Dispute

The validity of the Valderrama-George marriage and distribution of the proceeds from the settlement of the Milton George wrongful death action are questions governed solely by state law. On the rare occasion when state domestic relations law conflicts with a federal statute, this Court has limited review pursuant to the Supremacy Clause to determine only whether Congress has "positively required by direct enactment" that state law is pre-empted in the particular area. *See Wetmore v. Markoe*, 196 U.S. 68, 77 (1904). State family and family-property law must do "major damage" to "clear and substantial" federal interests before the Supremacy Clause demands overriding state law. *United States v. Yazell*, 382 U.S. 341, 352 (1966).

No federal law preempts New York's domestic relations and intestacy distribution statutes. The federal immigration laws upon which Petitioner relies neither explicitly nor implicitly preempt the state law at issue here. Rather, those federal statutes penalize fraudulent conduct made in the context of immigration applications. Pursuant to 8 U.S.C. § 1325(c), "[a]ny individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws shall be imprisoned for not more than 5 years, or fined not more than $250,000, or both." Under 18 U.S.C. § 1546(a) "[w]hoever knowingly makes under oath, or . . . knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations . . . [s]hall be fined under this title or imprisoned between 10 and 25 years or both."

Furthermore, the federal cases that Petitioner cites are inapposite. They are, predictably, criminal prosecutions for fraud against the United States government. Whether or not any state law declares a "green card" marriage as "void *ab initio*" was not at issue in any of those cases. *See United States v. Lutwak*, 344 U.S. 604, 611 (1953) (case involved conspiracy prosecution under War Bride Act and the validity or not of the marriages was not material to the case); *Chin Bick Wah v. United States*, 245 F.2d 274, 276-78 (9th Cir. 1957) (case involved prosecution for making a false statement in an immigration visa application that applicant would be supported by American spouse); *United States v. Rubenstein*, 151 F.2d 915 (2d Cir. 1945) (case involved conspiracy to defraud the United States based on false statement of marital support in application for visa).

Congress has never sought to supplant the authority of the states to regulate marriages and intestacy distribution, and the courts below correctly resolved this estate dispute by recourse to New York law.

CONCLUSION

Petitioner has not established any compelling reason for this Court to grant her petition. Accordingly, Respondents Dawind George and Maria Diaz respectfully request that her petition be denied.

Respectfully submitted,

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